Supreme Court, U.S.
FILED

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IN THE

Supreme Court of the United States

October Term, 1996

CAROLYN BECKER,

Petitioner,

v.

FEDERICO PENA, et al.,

Respondents.

Petition for Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Should the Feres doctrine be overruled?

2. Is the sexual harassment of a Coast Guard service member "incident to service" when the harassment serves no military purpose?

3. May uniformed members of the Coast Guard utilize the protections of the Fifth Amendment, the Federal Tort Claims Act, Title VII and/or 42 U.S.C. §§ 1985(3), 1986 to seek compensatory damages for harm caused by a gender-hostile work environment?

LIST OF PARTIES

The parties to the proceeding below are petitioner, Carolyn Becker, an employee of the United States Coast Guard, who was the Plaintiff-Appellant below; and respondents Federico Pena, Secretary of the United States Department of Transportation; Robert Kramek, Admiral, Commandant of the United States Coast Guard, in their official capacities; and Gregory W. Blanford, Daniel E. Shipman, and James A. Bankson, individually, and as employees of the United States Coast Guard; and the United States of America, who were Defendants-Appellees below.

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PETITION FOR WRIT OF CERTIORARI

The petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, filed on February 28, 1997.

OPINIONS BELOW

The decision of the Ninth Circuit Court of Appeals is reproduced in the Appendix at A-1 through A-5. The United States District Court's Minute Order and Order dismissing the case for lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted, are reproduced in the Appendix at A-6 through A-15.

JURISDICTION

The Court of Appeals' decision was filed and judgment entered on February 28, 1997.[1] The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

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[1] Appendix at A-1.

CONSTITUTIONAL PROVISIONS INVOLVED

THE FIFTH AMENDMENT[2]

No person shall be ... deprived of life, liberty, or property without due process of law....

STATUTORY PROVISIONS INVOLVED

TITLE VII--42 U.S.C. § 2000e-16(a), (e)[3]

(a) Discriminatory practices prohibited; employees or applicants for employment subject to coverage

All personnel actions affecting employees or applicants for employment in **military departments** as ... defined in Section 102 of Title 5 ... shall be made free from any discrimination based on race, color, religion, sex, or national origin.

. . .

(Emphasis added.)

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[2] See Appendix A-18 for verbatim text.

[3] See Appendix A-19, A-20 for verbatim text.

(e) Government agency or official not relieved of responsibility to assure nondiscrimination in employment or equal employment opportunity.

Nothing contained in this Act shall relieve any Government agency or official of its or his primary responsibility to assure nondiscrimination in employment as required by the Constitution and the statutes or of its or his responsibilities under Executive Order 11478 relating to equal employment opportunity in the Federal Government.

42 U.S.C. § 1985(3)[4]

Depriving persons of rights or privileges

If two or more persons in any State or Territory conspire ... for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws ... the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

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[4] See Appendix A-25, A-26 for verbatim text.

42 U.S.C. § 1986[5]

Action for Neglect to Prevent

Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in section 1985 of this title, are about to be committed, and having power to prevent or 'aid in preventing the commission of the same neglects or refuses so to do', if such wrongful act be committed, shall be liable to the party injured, or his legal representatives, for all damages caused by such wrongful act, which such person by reasonable diligence could have prevented; and such damages may be recovered in an action on the case; and any number of persons guilty of such wrongful neglect or refusal may be joined as defendants in the act; ...

28 U.S.C. § 2674[6]

Federal Tort Claims Act
Liability of the United States

The United States shall be liable respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private person under like circumstances....

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[5] See Appendix A-27 for verbatim text.

[6] See Appendix A-21, A-22 for verbatim text.

I. STATEMENT OF THE CASE

A. MATERIAL FACTS

Petitioner Carolyn Becker entered the United States Coast Guard in 1991. By all accounts, she was an excellent petty officer.[7] For approximately one year, Becker was the only woman stationed at a small boat station with numerous men. Upon her arrival, her male supervisors began a relentless campaign of gender-based harassment against her.[8] She was called a "wench", a "douchebag", and a "cunt".[9] Her supervising officers urinated and played with their groins in front of her.[10] Masturbation was simulated in front of her and she was summoned to a conversation about ejaculation.[11] She was forced to sleep on a living room couch or in a bedroom with men (in violation of Coast Guard regulation).[12] She was

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[7] Complaint, pages 18-20; ER 18-20.

[8] Complaint, page 8; ER 8.

[9] Complaint, page 10; ER 10.

[10] Complaint, pages 12, 15; ER 12, 15.

[11] Complaint, pages 12, 15; ER 12, 15.

[12] Complaint, page 16; ER 16.

threatened with a screwdriver.[13] Her car was illegally prowled.[14] She was relentlessly harassed about the details of a GYN visit.[15] She was forced to paint and breathe intoxicating fumes without a respirator. (The men were all given respirators.)[16] The harassment targeted Becker because of her gender and continued, unabated, for years.[17]

Becker was denied access to her administrative remedies without first processing her complaints through numerous harassing supervisors (in violation of Coast Guard policy).[18] Despite this obstacle, Becker filed numerous complaints of sexual harassment, and the District Court found she exhausted her administrative remedies.[19]

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[13] Complaint, page 14; ER 14.

[14] Complaint, page 13; ER 13.

[15] Complaint, page 13; ER 13.

[16] Complaint, page 9; ER 9.

[17] Complaint, pages 8-18, 21-26; ER 8-18, 21-26.

[18] Complaint, page 6; ER 6; Supplemental Declaration of Carolyn Becker in Opposition to Defendants' Motion to Dismiss for Alleged Lack of Subject Matter Jurisdiction and Alleged Failure to State a Claim Upon Which Relief Can Be Granted, pages 2, 3; ER 53, 54.

[19] Appendix, A-14.

A Coast Guard investigation confirmed 28 of Ms. Becker's complaints, yet the Coast Guard failed to follow its policy and make her "whole".[20] Ms. Becker developed Post-Traumatic Stress Disorder and was disabled as a result of the harassment.[21]

B. THE PROCEEDINGS BELOW

1. The District Court Opinion

The horrible nature of the Coast Guard's conduct was acknowledged by the District Court Judge during oral argument and conceded by the Assistant U.S. Attorney:

> THE COURT: This is pretty horrible conduct, isn't it, counsel?
>
> U.S. ATTORNEY: . . . if you take the facts as a whole, yes, it is egregious conduct.[22]

The District Court further found that, ". . . plaintiff's allegations, if true, would constitute serious constitutional violations."[23]

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[20] Complaint, page 22; ER 22.

[21] Declaration of Plaintiff Carolyn Becker, page 3; ER 50.

[22] Hearing on Motion, page 31, lines 8, 15, ER 142.

[23] Appendix at A-14.

Despite these findings, the District Court, bound by the Feres[24] doctrine, dismissed Ms. Becker's claims for lack of subject matter jurisdiction and failure to state a claim on which relief could be granted.[25]

2. The Court of Appeals Decision

A three-judge panel of the Court of Appeals found: "The Coast Guard does not dispute the impropriety of the harassing officers' conduct."[26] However, the panel affirmed the dismissal, stating: "While the acts of sexual harassment served no military purpose, they were incident to Becker's military service",[27] and thus barred by the Feres doctrine.

The Court of Appeals also concluded, "Title VII protections do not extend to uniformed members of the Coast Guard."[28] The panel failed to reach petitioner's claims under 42 U.S.C. §§ 1985(3), 1986, asserting Becker failed to exhaust

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[24] Feres v. United States, 340 U.S. 135, 71 S. Ct. 153, 95 L. Ed. 152 (1950).

[25] Appendix at A-6, A-7.

[26] Appendix at A-4.

[27] Appendix at A-3.

[28] Appendix at A-2.

her administrative remedies.[29] This conclusion directly contradicted the district court's finding that Ms. Becker had in fact exhausted her administrative remedies.[30] See also: Final Agency Action of the U.S. Department of Transportation United States Coast Guard. Appendix at A-16, A-17.

C. THE BASIS OF JURISDICTION IN THE DISTRICT COURT

Subject matter jurisdiction in the district court is based on 28 U.S.C. § 1331; 28 U.S.C. § 1343(a)(1), (2), (3) and (4); 42 U.S.C. § 2000e-5(f)(3); 42 U.S.C. 2000e-16(a) and (c); and Bivens v. Six Unknown Agents of Federal Bureau of Narcotics, 403 U.S. 388, 29 L. Ed. 2d 619, 91 S. Ct. 1999 (1971).

II. REASONS FOR GRANTING THE PETITION

A. THE FERES DOCTRINE IS EXTENSIVELY AND ALMOST UNIVERSALLY CRITICIZED.

1. A View From Justice Scalia

Justice Scalia expresses the following opinion: The Feres decision is "clearly wrong" and has bred "unfairness" and "irrationality". United States v. Johnson, 481 U.S. 681, 703, 95 L. Ed. 2d 648, 107 S. Ct. 2063, 2075 (1987) (Scalia, J.,

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[29] Appendix at A-4.

[30] Appendix at A-14.

dissenting). Justice Scalia's dissent in Johnson, supra, persuasively argues that the rationales underlying the Feres doctrine are "bad estimations", and "unpersuasive", Johnson, supra, 481 U.S. at 695-696, 107 S. Ct. at 2071-72 (Scalia, J., dissenting). He refers to the Feres decision as "unauthorized rationalization gone wrong", Johnson, supra, 481 U.S. at 702, 107 S. Ct. at 2075 (Scalia, J., dissenting).

Justice Scalia's scholarly criticism of the Feres doctrine concludes:

> Feres was wrongly decided and deserves the 'widespread, almost universal criticism' it has received. In re 'Agent Orange' Product Liability Litigation, 580 F. Supp. 1242, 1246 (E.D.N.Y.), appeal dism'd, 745 F.2d 161 (C.A.2 1984).

Johnson, supra, 481 U.S. at 700, 107 S. Ct. at 2074 (Scalia, J., dissenting).

This Court is urged to examine Justice Scalia's dissent in the Johnson case, supra, and consider overruling the Feres doctrine.

2. A View From the Circuit Courts of Appeal

a. The Ninth Circuit

The Ninth Circuit Court of Appeals, from which petitioner's case arises, states "The Feres doctrine today stands

on shaky ground with its precise justification somewhat confused." Monaco v. United States, 661 F.2d 129, 134 (9th Cir. 1981), cert. denied, 456 U.S. 989, 102 S. Ct. 2269, 73 L. Ed. 2d 1284 (1982).

Petitioner's Circuit has expressed a "... general distaste for the Feres doctrine (shared, one might add, by countless courts and commentators) ...". Persons v. United States, 925 F.2d 292, 295 (9th Cir. 1991). The Ninth Circuit states that "... confusion has spread over its [Feres] intricacies" and refers to the "incident to service" test as a "repository of ambiguity". Persons, supra, 925 F.2d at 295. The Ninth Circuit asserts: "It would be tedious to recite, once again, the countless reasons for feeling discomfort with Feres ...". Persons, supra, 925 F.2d at 299. The Ninth Circuit feels "manacled by precedent" and has "repeatedly expressed its strong reservations [regarding Feres] before ultimately overcoming them."[31] Persons, supra, 925 F.2d at 299. The Ninth Circuit states: "There comes a point where even Feres concatenations must come to an end...". Persons, supra, 925 F.2d at 299.

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[31] Veillette v. United States, 615 F.2d 505, 506 (9th Cir. 1980) ("Reluctantly, we affirm."); Atkinson v. United States, 825 F.2d 202, 206 (9th Cir. 1987), cert. denied, 485 U.S. 987, 108 S. Ct. 1288, 99 L. Ed. 2d 499 (1988) (grudgingly reversing a prior decision in light of Johnson, supra).

b. Other Federal Circuits

The critics of the Feres doctrine extend far beyond the Ninth Circuit.

> "I have grave doubts about too casually advancing the hastening sweep of the Feres doctrine".

Bois v. Marsh, 801 F.2d 462, 471 (D.C. Cir. 1986) (Wald Chief J., dissenting).

> "[T]he Feres doctrine clearly lives, although its theoretical bases remain subject to serious doubt".

Hunt v. United States, 636 F.2d 580, 589 (D.C. Cir. 1980).

> "Feres appears to grant an immunity which is broader than necessary and, as a result, the application of that immunity may at times lead to unconscionable results".

Thornwell v. United States, 471 F. Supp. 344, 348 n.1 (D.C. D.C. 1979).

> "Over the years, Feres has been criticized widely by courts and commentators, and the theoretical bases of the doctrine have lost much of their force."

Sanchez v. United States, 813 F.2d 593, 595 (2nd Cir. 1987).

> "Therefore, once again we are constrained to follow the Feres doctrine, notwithstanding its harsh result."

LaBash v. United States Department of Army, 668 F.2d 1153, 1156 (10th Cir. 1982), cert. denied, 456 U.S. 1008, 102 S. Ct. 2299, 73 L. Ed. 2d 1303 (1982).

> "... [W]e are compelled, however reluctantly, to ... dismiss the claim as barred by Feres. We are not blind to the tragedy of [the plaintiff's] condition, and regret the effects of our conclusion. Nevertheless, we are not writing on a clean slate."

Scales v. United States, 685 F.2d 970, 974 (5th Cir. 1982), cert. denied, 460 U.S. 1082, 103 S. Ct. 1772, 76 L. Ed. 2d 344 (1983).

> "We are forced once again to decide a case where 'we sense the injustice ... of [the] result' but where nevertheless we have no legal authority, as an intermediate appellate court, to decide the case differently."

Hinkie v. United States, 715 F.2d 96, 97 (3rd Cir. 1983), cert. denied, 465 U.S. 1023, 104 S. Ct. 1276, 79 L. Ed. 2d 680 (1984).

> "If the matter were open to us we would be receptive to appellants' argument that Feres should be reconsidered.... Only the Supreme Court can reverse it.... Certainly the facts pleaded here, if true, cry out for a remedy."

Peluso v. United States, 474 F.2d 605, 606 (3rd Cir. 1973) (per curiam), cert. denied, 414 U.S. 879, 94 S. Ct. 50, 38 L. Ed. 2d 124 (1973).

"The Feres doctrine is a blunt instrument...".

Bozeman v. United States, 780 F.2d 198, 200 (2nd Cir. 1985).

The time has come to revisit Feres.

B. AS A MATTER OF PUBLIC POLICY, THE SEXUAL HARASSMENT OF AMERICAN SERVICE MEMBERS, WHICH ALL PARTIES AGREE SERVES NO MILITARY PURPOSE, SHOULD NOT BE IMMUNIZED BY LAW.

The United States Justice Department has conceded that: "[T]he damage claims for sexual harassment raised by the Coast Guard service member in this case involve legal and factual issues that are of ... substantial public importance."[32]

The sexual harassment of American service members is, like the conduct in Stanley, infra, "... conduct ... so far beyond the bounds of human decency that as a matter of law it simply cannot be considered a part of the military mission." United States v. Stanley, 483 U.S. 669, 107 S. Ct. 3054, 3065, 97 L. Ed. 2d 550 (1983) (O'Connor, J., dissenting).

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[32] See Letter from E. Roy Hawkins, Attorney, Appellate Staff, U.S. Justice Department, to the Clerk of the United States Court of Appeals for the Ninth Circuit, Appendix A-28, A-29.

The public's confidence in the military will erode if military officials are permitted to sexually harass subordinates with impunity precisely because they wear uniforms and commit their harassing acts during working hours.

> . . . [I]n considering the public interest, the court also believes that the public has a strong interest in having a military that conducts itself fairly and according to its stated regulations and policies. If the military misapplies its own rules and unfairly discharges and stigmatizes a serviceman without giving him the constitutional consideration he is due, this erodes trust in the military.

Cooney v. Dalton, 877 F. Supp. 508, 515 (D. Hawaii 1995).

As a matter of public policy, the sexual harassment of American service members who exhaust their administrative remedies should not go unchecked by the federal courts. The Feres doctrine, as applied by the lower courts, allows sexual harassment to perpetuate in the military. The legal immunization of sexual misconduct by military men compromises military functioning and erodes public confidence in our military establishment.

Petitioner's local newspaper, the Seattle Times, editorialized regarding the injustice of the Coast Guard's response to petitioner's claims:

> If all the Coast Guard can show for its efforts to discourage sexual harassment is a vigorous

> investigation, then it has no program. Simply gathering facts does nothing to convey from the top down that sexual harassment will not be tolerated. Paper shuffling without consequences is no answer.[33]

This Court is urged to grant petitioner's writ and consider whether the sexual harassment of American service members should be immunized from civil prosecution pursuant to the Feres doctrine. As a matter of public policy, we believe it should not. No judicially-crafted rule should insulate from liability the deliberate and calculated mistreatment of one military member by another. Stanley, supra, 107 S. Ct. at 3065-3066 (O'Connor, J., dissenting).

This Court is urged to grant petitioner's writ and consider ruling that sexual harassment serves no military purpose and therefore is not "incident to service" as a matter of law.

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[33] "No Coast Guard Justice for Harassed Petty Officer", Seattle Times Editorial, Appendix A-32.

C. MEN AND WOMEN WHO DEFEND THEIR COUNTRY FOR A LIVING SHOULD NOT BE DENIED THE PROTECTIONS OF THE VERY CONSTITUTION THEY SERVE.

The Feres doctrine denies American service members equal justice under the law. Public opinion, expressed in an editorial published in the Seattle Times, notes the injustice wrought by Feres. "Does a woman lose the right to redress the wrongs of sexual harassment because she puts on a uniform? If she is in the Coast Guard, the answer appears to be yes."[34]

As a matter of public policy, American citizens who choose to wear a uniform and defend their country for a living should not be denied the protections of the very Constitution they serve.

> ... the decisionmaking of federal officials deliberately choosing to violate the constitutional rights of soldiers should be impaired. I cannot comprehend a policy judgment that frees all federal officials from any doubt that they may intentionally, and in bad faith, violate the constitutional rights of those serving in the Armed Forces.

United States v. Stanley, supra, 107 S. Ct. at 3076 (Brennan, J., dissenting).

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[34] Seattle Times Editorial, "No Coast Guard Justice for Harassed Petty Officer", Appendix A-30.

The Feres doctrine denies American service members equal access to justice. The Feres doctrine permits the military establishment to violate the American Constitution with impunity. The Feres doctrine is legally indefensible and morally wrong. American justice requires that a great civil wrong be afforded an appropriate civil remedy. "Soldiers ought not be asked to defend a Constitution indifferent to their essential human dignity." United States v. Stanley, 483 U.S. 669, 97 L. Ed. 2d 550, 107 S. Ct. 3054, 3077 (1987) (Brennan, J., dissenting).

III. CONCLUSION

Justice Scalia is right: Feres was wrongly decided and heartily deserves the "'widespread, almost universal criticism' it has received." Johnson, supra, 107 S. Ct. at 2074. As a matter of public policy, the American justice system should not deny legal redress to the honorable citizens who devote their lives to serving our country.

For the above reasons, this Court is urged to grant the Petition for Writ of Certiorari and consider overruling the Feres doctrine. In the alternative, this Court is urged to grant the Petition for Writ of Certiorari and consider narrowly defining the Feres "incident to service" test to exclude conduct which serves no conceivable military purpose, i.e., sexual harassment.

This Court is also asked to grant the Petition for Writ of Certiorari for another reason: The plain reading of Title VII prohibits discrimination against employees of "military departments", 42 U.S.C. § 2000e-16(a), page 2, infra. In deciding Mier v. Owens, 57 F.3d 747 (9th Cir. 1995), cert. denied, sub nom. Mier v. VanDyke, -- U.S. --, 116 S. Ct. 1317, 134 L. Ed. 2d 470 (1996), the Ninth Circuit ignored the plain wording of Congress and created a "uniformed member" exception to the law which prohibits sexual harassment in the military. This unjust and illogical interpretation of Title VII deprives petitioner of her statutory right to access the American court system to seek compensatory damages for violation of her constitutional right to work in an environment free from relentless gender-based hostility. This Court is asked to consider ruling that the protections of Title VII extend to uniformed members of the United States Coast Guard.

This Court is also asked to grant the petition for Writ of Certiorari and consider ruling that the protections of 28 U.S.C. §§ 1985(3), 1986, extend to uniformed members of the military. This question was specifically left open in Chappell v. Wallace, 462 U.S. 296, 103 S. Ct. 2362, 76 L. Ed. 2d 586, 593 (1983).

Sexual harassment is a major problem in the United States military. This cases raises issues of national importance

which have not been and should be decided by the United States Supreme Court.

DATED this the _____ day of May, 1997.

Respectfully submitted,

MUENSTER & KOENIG

By: _____

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CAROLYN BECKER, formerly Carolyn Green,	)	
Plaintiff-Appellant,	)	No. 95-36172
v.	)	D.C.No.CV-95-00748-TSZ
FEDERICO PENA, Secretary of the United States Department of Transportation; ROBERT KRAMEK, Admiral, Commandant of the U.S. Coast Guard; GREGORY W. BLANFORD, individually and as an employee of the U.S. Coast Guard; DANIEL E. SHIPMAN, individually and as an employee of the U.S. Coast Guard; JAMES A. BANKSON, individually and as an employee of the U.S. Coast Guard;	)	

UNITED STATES OF AMERICA,)
) MEMORANDUM***
Defendants-Appellants.)
)

Appeal from the United States District Court
for the Western District of Washington
Thomas S. Zilly, District Judge, Presiding

Argued and Submitted February 3, 1997
Seattle, Washington

Before: BROWNING, RYMER, and T.G. NELSON, Circuit Judges

I.

Carolyn Becker's Title VII claims were properly dismissed. Title VII protections do not extend to uniformed members of the Coast Guard. See Gonzalez v. Department of the Army, 718 F.2d 926, 928-29 (9th Cir. 1983); see also 10 U.S.C. § 101(4).

II.

The district court lacked subject matter jurisdiction over Becker's claims under the Federal Tort Claims Act because her

*** This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

alleged injuries were incident to her military service. See Feres v. United States, 340 U.S. 135, 146 (1950). Her allegation that the defendants negligently failed to supervise the harassers "goes directly to the 'management' of the military; it calls into question basic choices about the discipline, supervision, and control of a service[member]." United States v. Shearer, 473 U.S. 52, 58 (1985).

While the acts of sexual harassment served no military purpose, they were incident to Becker's military service. Virtually all of the harassing conduct occurred during working hours on the Coast Guard base. Becker's harassers were predominantly superior in rank and were subject to military discipline for harassing her. See Lutz v. Secretary of the Air Force, 944 F.2d 1477, 1487 (9th Cir. 1991) (suggesting that an injury that arises on the job is incident to military service).

III.

Becker failed to state a Fifth Amendment claim upon which relief can be granted. She may not sue Gregory Blanford, Daniel Shipman, and James Bankson because "enlisted military personnel may not maintain a suit to recover damages from a superior officer for alleged constitutional violations." Chappell v. Wallace, 462 U.S. 296, 305 (1983). She may not sue Admiral Kramek and Secretary Pena for failing to train Coast Guard members to obey the law. See Shearer, 473 U.S. at 58 (Feres

doctrine bars suits that question the military's decisions about management and supervision). And she may not state a direct constitutional claim against the Coast Guard. See FDIC v. Meyer, 114 S. Ct. 996, 1005-06 (1994).

IV.

We do not reach Becker's claims under 42 U.S.C. §§ 1985(3) and 1986 because she failed to exhaust her administrative remedies. See Miller v. Newbauer, 862 F.2d 771, 775 (9th Cir. 1988). Becker admits that she has not followed the procedure for obtaining administrative relief outlined in the Military Civil Rights Manual or in the Uniform Code of Military Justice. She contends she need not exhaust these administrative remedies because her harassing supervisors denied her the opportunity for administrative redress by denying her access to the Chetco River commanding officer from July 1992 through September 1993. The Coast Guard does not dispute the impropriety of the harassing officers' conduct. However, subsequent to this period, Becker received personal counselling from Military Civil Rights Counselors/Facilitators on how to file both informal and formal discrimination complaints in accordance with the Military Civil Rights Manual. She never pursued these avenues. Nor did Becker utilize 10 U.S.C. § 938, a provision of the Uniform Code of Military Justice that enables a servicemember to complain of unredressed wrongs committed

by a commanding officer to "any superior commissioned officer who [must] forward the complaint to the officer exercising general court-martial jurisdiction over the officer against whom it is made." (emphasis added).

We reject Becker's argument that she need not pursue her administrative remedies because they do not provide adequate relief. Although monetary damages are not available, she may be eligible for disability benefits, back pay, promotion, reinstatement, and adjustment in seniority level. We also reject Becker's contention that exhausting her administrative remedies would be futile. She has not adduced any evidence that the Coast Guard or the Department of Transportation would not fully and fairly consider her complaints.

AFFIRMED.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

HON. THOMAS S. ZILLY, U.S. DISTRICT JUDGE

Deputy Clerk: Elva McGregor

Court Reporter: Date: October 12, 1995

MINUTES

C95-748Z Carolyn Becker
vs.
United States of America

Kim Koenig
Ricardo Guarnero

ORAL ARGUMENT - GOVT'S MOTION FOR SUM. JDMT. OF DISMISSAL, docket no. 11

Cnsl. present. After hearing arg. of cnsl. the Court gives findings & conclusions and the motion is granted in part & denied in part for the reasons stated on the record.

The Court dismissed all claims except the first six causes of action and the eleventh cause of action, limited solely to the constitutional claims.

The Court takes the matter under submission re: pltf's constitutional claims and an order shall be issued within two weeks.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CAROLYN BECKER (formerly Carolyn Green),	)	NO. C95-748Z
Plaintiff,	)	
vs.	)	ORDER
FREDERICO PEÑA, Secretary of the United States Department of Transportation, et al.,	)	
Defendants.	)	

THIS MATTER comes before the Court on Defendant's motion to dismiss for lack of subject matter jurisdiction and failure to state a claim on which relief can be granted (docket no. 11). The Court, having heard oral argument on October 12, 1995, and having considered the parties' arguments and papers filed in support of and in opposition to the motion, hereby GRANTS Defendant's motion to dismiss all claims asserted by the plaintiff.

Plaintiff Carolyn Becker entered the United States Coast Guard in 1991. She was assigned to Chetco River Station, Rogue River, and the USCGC MELLON from August 30, 1991 to September, 1993. Her complaint alleges various acts of

harassment, including being called vulgar, derogatory names; being subject to men urinating in front of her; discussions of ejaculation, simulated sexual acts; an illegal car prowl; being forced to sleep on a living room couch; and being menaced with a screwdriver.

Plaintiff's complaint alleges fourteen causes of action against six defendants. At the oral argument on October 12, 1995, the Court dismissed causes of action seven through ten and eleven through fourteen. See Minutes, docket no. 38. This Order addresses only the remaining constitutional claims in causes of action one through six, and eleven.

Plaintiff asserts a claim for damages under the Fifth Amendment to the Constitution for sexual harassment. Although the complaint prays for injunctive relief, plaintiff concedes that injunctive relief is not practical in this case and has withdrawn her request for that remedy.

In Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388, 91 S. Ct. 1999, 29 L.Ed.2d 619 (1971), the Supreme Court authorized a suit for damages against federal officials whose actions violate an individual's Fourth Amendment rights, even in the absence of a statute authorizing such relief. Subsequently, in Davis v. Passman, 442 U.S. 228, 248-49, 99 S. Ct. 2264, 2279, 60 L. Ed. 2d 846, 865 (1979), the Court extended Bivens to suits for damages brought under the Due

Process Clause of the Fifth Amendment. In both cases, however, the Court cautioned that such actions are barred where "special factors counselling hesitation" exist. Bivens, 403 U.S. at 396; Davis, 442 U.S. at 246-247.

In Chappell v. Wallace, 462 U.S. 296, 300, 103 S. Ct. 2362, 76 L. Ed. 2d 586 (1983), the Supreme Court found "factors counselling hesitation" in "[t]he need for special regulations in relation to military discipline, and the consequent need and justification for a special and exclusive system of military justice." Id. Based on these special factors, the Court held that it was inappropriate to provide enlisted military personnel a Bivens-type remedy against their superior officers. Later, in United States v. Stanley, 483 U.S. 669, 681, 107 S. Ct. 3054, 3062, 97 L. Ed. 2d 550, 565 (1983), the court clarified that Chappell's bar on Bivens claims was not limited to actions by enlisted personnel against superior officers, but rather encompassed all actions for injuries that "arise out of or are in the course of activity incident to service." Stanley, 483 U.S. 684 (quoting United States v. Feres, 340 U.S. 135, 71 S. Ct. 153, 95 L. Ed. 152 (1950)). Thus, the Supreme Court has adopted an "incident to service" test to be applied in determining whether a Bivens cause of action may be maintained. Where the plaintiff's injuries arise out of or are in the course of activity

incident to service, "special factors counselling hesitation" exist and no Bivens-type action may be brought.

Plaintiff argues that the allegations in her complaint involve actions not incident to military service. She relies primarily on Lutz v. Secretary of the Air Force, 944 F.2d 1477 (9th Cir. 1991), in which the Ninth Circuit found that the actions of the individual defendants were not "incident to service" and therefore the plaintiff's claims against them were not barred. In Lutz, three off-duty sergeants broke into Lutz's office, opened her personal mail, and disseminated it to others in an attempt to harm her reputation and damage her military career. Id. at 1479. The government focused on three factors in arguing that the course of activity was "incident to military service:" (1) Lutz's status as an active duty military officer, (2) the fact that both Lutz and the sergeants were subject to military discipline, and (3) the fact that plaintiff's alleged damages were to her military career. Id. at 1485. The court rejected the government's argument that these factors were determinative, noting that these factors were overinclusive and, if applied, would preclude suits that would otherwise be maintainable under Stanley. Lutz, 944 F.2d at 1485. Having rejected these factors, the court concluded that the defendants' removal of personal documents from their commander's desk after working hours and distribution of them to other personnel constituted "[i]ntentional

tortious and unconstitutional acts directed by one servicemember against another which further[ed] no conceivable military purpose and [were] not perpetrated during the course of a military activity." Id. at 1487. As such, the acts were not incident to military service.

In finding that the actions of the defendants in Lutz were not activities incident to service, the Ninth Circuit distinguished a previous case, Stauber v. Cline, 837 F.2d 395 (9th Cir. 1988), in which the court found that the defendants' acts of harassment were incident to military service. The Lutz court explained that in Stauber, unlike Lutz, the defendants were all superior officers, the alleged harassing acts largely took place during working hours and in the process of work, and many of the acts were related to working conditions. Although some of the harassing acts in Stauber took place off base and after hours, these acts were merely an extension of on-base events. The court further concluded that where it is "sufficiently ambiguous" whether challenged actions are incident to military service and the process of disentangling conduct not incident to service from conduct incident to service would itself work an impermissible intrusion upon military matters, the entire course of conduct must be viewed as "incident to service" and the plaintiff's claims barred. Lutz, 944 F.2d at 1487.

The alleged acts of harassment here are closer to the actions in Stauber than those in Lutz. Defendants' alleged harassment of plaintiff took place during working hours within the working environment. While many of the most menacing and demeaning acts of harassment were allegedly committed by other servicemembers, the plaintiff has brought constitutional claims only against her superior officers. Plaintiff's claims against these officers are limited for the most part to the officers' failure to discipline the servicemembers who harassed her, to respond professionally and responsibility to her complaints, and to take steps to ameliorate the allegedly hostile working environment.[1] Because plaintiff's constitutional claims are

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[1] Plaintiff does allege that defendant Shipman, a superior officer, personally committed acts of harassment. For example, plaintiff alleges that Shipman made a lewd gesture to another servicemember, in full view of the plaintiff (Complaint ¶ 29); violated her privacy by hounding other servicemembers to determine plaintiff's reasons for seeing a gynecologist (Complaint ¶ 34); and screamed at her while repeatedly stabbing a screwdriver into a counter top (Complaint ¶ 36). These particular acts clearly furthered no military purpose and were "incident to service" only in the sense that they occurred on the job during working hours. Nevertheless, the majority of plaintiff's allegations involve the officers' failure to take appropriate action in response to her complaints of sexual harassment. As Lutz instructs, where it is "sufficiently ambiguous" whether the allegations as a whole are incident to

(continued...)

based largely on the failure of her superior officers to maintain proper order and discipline, her claims arise out of or are in the course of activity incident to service. As a result, "special factors counselling hesitation" exist and no Bivens cause of action can be maintained.

Even if this Court accepted plaintiff's argument that the alleged acts of sexual harassment were not incident to military service and therefore she is not precluded from bringing a Bivens action for damages, the court would still have to determine whether it is proper to exercise judicial review of plaintiff's constitutional claims. The multifactored test for determining whether a civilian court should review a servicemember's constitutional claims against the military is set forth in Christoffersen v. Washington State Air National Guard, 855 F.2d 1437, 1442 (9th Cir. 1988), cert. denied, 490 U.S. 1098, 109 S. Ct. 2448, 104 L. Ed. 2d 1003 (1989):

> [A]n internal military decision is unreviewable unless the plaintiff alleges (a) a violation of [a

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[1](...continued)
service, and where the process of disentangling conduct not incident to service itself works an impermissible intrusion upon military matters, the conduct as a whole must be viewed as incident to service. Lutz, 944 F.2d at 1487. Here, viewing plaintiff's Complaint in its entirety, the Court concludes that the alleged acts of harassment were "incident to service."

> recognized constitutional right], a federal statute, or military regulations; and (b) exhaustion of intraservice remedies. If the plaintiff meets both prerequisites, the trial court must weigh four factors to determine whether review should be granted:
>
> > (1) The nature and strength of the plaintiff's claim. . . .
> > (2) The potential injury to the plaintiff if review is refused.
> > (3) The extent of interference with military functions.
> > (4) The extent to which military discretion or expertise is involved.

Id. (quoting Khalsa v. Weinberger, 779 F.2d 1393, 1398 (9th Cir.), reaff'd, 787 F.2d 1288 (1986)) (emphasis in original).

Here, plaintiff has met both prerequisites to review in that she has alleged a constitutional violation and exhaustion of her administrative remedies. Thus, this Court's task is limited to balancing the four Christoffersen factors to determine if review is proper. The Court concludes that, on balance, these factors weigh against granting review. The first factor, the nature and strength of plaintiff's claims, favors review because plaintiff's allegations, if true, would constitute serious constitutional violations. The second factor weighs slightly in favor of review because plaintiff will not be fully compensated for the injuries she has sustained if review is denied. Plaintiff is not wholly without a remedy, however, in that she may receive compensa-

tion under the Coast Guard's medical disability benefits program for any medical conditions caused by the harassment. The third and fourth factors, the extent of interference with military functions and the extent to which military discretion is involved, weigh heavily against judicial review. The essence of plaintiff's claims against her superiors is that they failed to discipline properly their subordinates, failed to maintain proper order, and failed to take corrective actions they had discretion to take. The Coast Guard has already investigated the allegations in plaintiff's complaint and issued findings of fact, an opinion, and a recommendation. Any review of the plaintiff's allegations by this court would necessarily involve second-guessing the military's discretion and expertise. Under these circumstances, this Court must decline to review plaintiff's constitutional claims despite their seriousness.

IT IS SO ORDERED.

The Clerk of the Court is directed to send uncertified copies of this order to all counsel of record.

DATED this 2nd day of November, 1995.

Thomas S. Zilly

THOMAS S. ZILLY
UNITED STATES DISTRICT JUDGE

U.S. Department of Transportation

Commander (lc) Maintenance&Logistic Command Pacific

Building 54-C Coast Guard Island
Alameda, CA 94501-5100
TEL: (510)437-3644
FAX: (510)437-3341

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3395LC0140
4 May 95

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Kim D. Koenig, Esq.
Muenster & Koenig
1613 Smith Tower
506 2nd Ave.
Seattle, WA 98104

Re: Formal Administrative Complaint and Claim for Damages - SK3 Carolyn Becker, USCG

Dear Ms. Koenig:

The claim for damages which you submitted on behalf of Petty Officer Becker is denied.

Your claim for damages was considered under all possibly relevant statutory authorities. To the extent that this claim may fall within the federal Tort Claims Act, this denial constitutes final agency action. If you are dissatisfied with this decision, you may file suit in an appropriate U.S. District Court not later than six months after the date this letter is mailed. Requirements for filing suit under various claims statutes differ considerably.

Any statutes which you consider applicable should be consulted for specific requirements.

Any request for reconsideration of this denial must be submitted in writing prior to filing suit and must be filed with Commander Hugh Sage, Chief, Claims & Litigation Branch, at the above address within six months of the date of this letter.

Your Formal Administrative Complaint and Claim for Damages asserts violations of the Uniform Code of Military Justice. No military justice action can be initiated based on your complaint. Petty Officer Becker should contact her unit chain of command if she desires to report an offense by any military member.

Your formal Administrative Complaint and Claim for damage also asserts violations of federal equal rights statutes. Military members generally have no right to claim Title VII protections or sue the Federal Government under Title VII. However, the Coast Guard has established policies and procedures to address complaints of discrimination by members so that uniformed personnel are treated fairly. If you have any questions about these policies and procedures you may contact Ms. Eleanor Elrod, Chief, General Law Branch at (510)437-3347.

Sincerely,

W.H. NORRIS
Captain, U.S. Coast Guard
Chief, Legal Division
By direction of the Commander

Copy: Commander, Thirteenth Coast Guard District (dl)
Commanding Officer, Coast Guard Support Center Seattle

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

42 U.S.C. § 2000e-16(a), (e)

§ 2000e-16. Employment by Federal Government

(a) Discriminatory practices prohibited; employees or applicants for employment subject to coverage

All personnel actions affecting employees or applicants for employment (except with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of Title 5, in executive agencies as defined in section 105 of Title 5 (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Rate Commission, in those units of the Government of the District of Columbia having positions in the competitive service, and in those units of the legislative and judicial branches of the Federal Government having positions in the competitive service, and in the Library of Congress shall be made free from any discrimination based on race, color, religion, sex, or national origin.

. . .

(e) Government agency or official not relieved of responsibility to assure nondiscrimination in employment or equal employment opportunity

Nothing contained in this Act shall relieve any Government agency or official of its or his primary responsibility to

assure nondiscrimination in employment as required by the Constitution and statutes or of its or his responsibilities under Executive Order 11478 relating to equal employment opportunity in the Federal Government.

FEDERAL TORT CLAIMS ACT

TITLE 28, U.S.C. § 2674

§ 2674. Liability of United States

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof.

With respect to any claim under this chapter, the United States shall be entitled to assert any defense based upon judicial or legislative immunity which otherwise would have been available to the employee of the United States whose act or omission gave rise to the claim, as well as any other defenses to which the United States is entitled.

With respect to any claim to which this section applies, the Tennessee Valley Authority shall be entitled to assert any defense which otherwise would have been available to the

employee based upon judicial or legislative immunity, which otherwise would have been available to the employee of the Tennessee Valley Authority whose act or omission gave rise to the claim as well as any other defenses to which the Tennessee Valley Authority is entitled under this chapter.

TITLE 10 U.S.C. § 101(4)

(4) "Armed forces" means the Army, Navy, Air Force, Marine Corps, and Coast Guard.

TITLE 5 U.S.C. § 102

§ 102. Military departments

The military departments are:

The Department of the Army.

The Department of the Navy.

The Department of the Air Force.

(Pub. L. 89-554, Sept. 6, 1966, 80 Stat. 378.)

42 U.S.C. § 1985(3)

(3) Depriving persons of rights or privileges

If two or more persons in any State or Territory conspire, or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the qual protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy;' in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an

action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators. (R.S. § 1980.)

42 U.S.C. § 1986

Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in section 1985 of this title, are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses to so do, if such wrongful act be committed, shall be liable to the party injured, or his legal representatives, for all damages caused by such wrongful act, which such person by reasonable diligence could have prevented; and such damages may be recovered in an action on the case; and any number of persons guilty of such wrongful neglect or refusal may be joined as defendants in the action; and if the death of any party be caused by any such wrongful act and neglect, the legal representatives of the deceased shall have such action therefor, and may recover not exceeding five thousand dollars damages therein, for the benefit of the widow of the deceased, if there be one, and if there be no widow, then for the benefit of the next of kin of the deceased. But no action under the provisions of this section shall be sustained which is not commenced within one year after the cause of action has accrued.

(R.S. § 1981.)

U.S. Department of Justice

ERHawkens
DJ#145-18-2488

Telephone: (202)514-5714
Fax: (202)514-8151

Washington, D.C. 20530

March 10, 1997

Ms. Cathy Catterson
Clerk, United States Court of Appeals
for the Ninth Circuit
121 Spear Street, Second Floor
San Francisco, CA 94105-1566

Re: Carolyn Becker v. Secretary of Transportation, No. 95-36172 (9th Cir. Feb. 28 1997).

Dear Ms. Catterson:

This Court (Judges Browning, Rymer, T.G. Nelson) issued a memorandum decision in the above-referenced case on February 28, 1997. Pursuant to Ninth Circuit Rule 36-4, the Government requests that this decision be designated as an opinion for publication. It meets the "Criteria for Publication" in Rule 36-2 in the following respects. First, the damage claims for sexual harassment raised by the Coast Guard service member in this case involve legal and factual issues that are "of unique interest [and] substantial public importance" (Rule 36-2(d)). Second, this decision "clarifies [the following] rule[s] of law"

(Rule 36-2(a)): (1) uniformed members of the Coast Guard are, for purposes of Title VII, deemed to be members of the Armed Forces at all times; and (2) although sexual harassment serves no military purpose, a service member's alleged injuries arising from such harassment are deemed incident to service under the Feres doctrine if they occur on a military base, during working hours, and at the hands of her military superiors.

Thank you for your assistance in this matter.

Sincerely,

E. ROY HAWKENS
Attorney, Appellate Staff

THE SEATTLE TIMES OPINION
FRIDAY, OCTOBER 20, 1995

EDITORIALS

No Coast Guard justice for harassed petty officer

DOES a woman lose the right to redress the wrongs of sexual harassment because she puts on a uniform? If she is in the Coast Guard, the answer appears to be yes.

The Coast Guard's own exhaustive investigation confirmed that Petty Officer Carolyn Becker had been tormented and humiliated, but the Coast Guard failed to punish individual wrong-doers and send a message that sexual harassment will not be tolerated.

Meanwhile, the Navy's handling of harassment charges that are a closer call sets a standard for other military branches dealing with the same problem.

In the Navy case, its former top equal-opportunity officer was acquitted yesterday of the sexual harassment of a female officer who worked for him. Capt. Everett L. Greene had overseen the Navy's awareness programs after the 1991 Tailhook scandal. He was accused of taking an office friendship too far with suggestive poems, greeting cards and small gifts.

Greene's circumstance is light years away from the assaultive debauchery of Tailhook, but the Navy has drawn a

hard line and has been hard-nosed about holding transgressors accountable.

Contrast the Navy's response with the puny efforts of the Coast Guard to deal with the supervisors and shipmates who tormented Becker through a nightmare tour of duty on the southern Oregon coast. Her complaints, properly raised through the chain of command, were perceived as disloyalty. Performance reviews and advancement opportunities suffered accordingly.

Her tormenters received counseling instead of discipline, and went on to receive promotions. Becker had to put her future on the line by challenging superiors and alienating colleagues just to ask for help.

To press her grievance, Becker was forced into the civil courts, where legal precedents keep a respectful distance from military affairs.

Federal Judge Thomas Zilly was wholly sympathetic to the "horrible conduct" she endured, but dismissed most of her case because the military is exempted from the 1964 Civil Rights Act and a string of earlier court cases that generally steer civil courts away from interference in military affairs. Zilly is considering whether the circumstances represent such an egregious violation of rights as to warrant a breach of the

civilian-military boundary. Why does it have to come to this extraordinary court proceeding?

If all the Coast Guard can show for its efforts to discourage sexual harassment is a vigorous investigation, then it has no program. Simply gathering facts does nothing to convey from the top down that sexual harassment will not be tolerated. Paper shuffling without consequences is no answer.

The Navy has heard and answered public outrage; the Coast Guard seems ignorant of those lessons. Will equity and protection have to come through legislative changes or through political pressure from the Coast Guard's civilian patron, the Department of Transportation?

Why does it fall to Petty Officer Becker to change how the Coast Guard responds to sexual harassment?